


IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

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CLERK U.S. DISTRICT COURT
W.D. OF TENN. JACKSON

HUBERT RAY MATTHEWS, SR.,
as Power of Attorney of Hubert Ray
Matthews, Jr., an incapacitated person,

Plaintiff,

VS.

KINDRED HEALTHCARE, INC.,
et al.,

Defendants.

No. 05-1091-T-An

ORDER DENYING MOTION FOR
ENTRY OF DEFAULT AND DEFAULT JUDGMENT

On November 3, 2005, Plaintiff filed a motion for entry of default and for a default judgment against Defendants Anthony Mays and Kindred Nursing Centers East, LLC. On November 9, 2005, Defendants filed a response to Plaintiff's motion, stating that the names of these defendants were accidentally omitted from Defendants' second motion to dismiss or, alternatively, for summary judgment. Defendants also state that these defendants participated in voluntary mediation with Plaintiff.

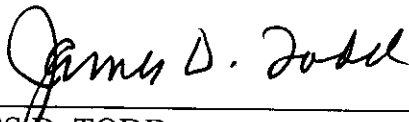
There is a strong public policy, supported by the concept of fundamental fairness, in favor of trial on the merits. See United Coion Meter Co., Inc., v. Seaboard Coastline RR., 705 F.2d 839, 846 (6th Cir. 1983). See also Swink v. City of Pagedale, 810 F.2d 791 (8th

Cir.1987), *cert. denied*, 483 U.S. 1025 (1987); Jackson v. Beech, 636 F.2d 831(D.C. Cir.1980). As a consequence, judgment by default is a "drastic remedy" which should be used only in "extreme situations." 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d*, § 2693; Flaksa v. Little River Marine Construction Co., 389 F.2d 885 (5th Cir.1968), *cert. denied*, 392 U.S. 928 (1968).

Consequently, when a defendant appears and indicates a desire to contest an action, a court, in its discretion, may refuse to enter default, in accordance with the policy of allowing cases to be tried on the merits. 10 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d, supra*. Default judgments are not favored and is appropriate only when there has been a "clear record of delay or contumacious conduct." *Id.* (citing United States on Behalf of and for the Use of Time Equipment Rental & Sales, Inc. v. Harre, 983 F.2d 128 (8th Cir.1993)).

In the present case, Defendants' failure to answer in a timely manner was not willful. Furthermore, Plaintiff has not demonstrated that he has been prejudiced by the belated answer. Accordingly, Plaintiff's motion for entry of default and for default judgment is DENIED.

IT IS SO ORDERED.



JAMES D. TODD
UNITED STATES DISTRICT JUDGE

29 November 2005
DATE



Notice of Distribution

This notice confirms a copy of the document docketed as number 41 in case 1:05-CV-01091 was distributed by fax, mail, or direct printing on December 1, 2005 to the parties listed.

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Honorable James Todd
US DISTRICT COURT